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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARJORIE LEHMAN, on behalf of her children, WILLIAM LEHMAN, MARK LEHMAN and FRANK LEHMAN,

Petitioners,

—v.—

LYCOMING COUNTY CHILDREN'S SERVICES AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

WHETHER A PETITION FOR A WRIT OF HABEAS CORPUS IS AVAILABLE FOR A FEDERAL CONSTITUTIONAL CHALLENGE BY A MOTHER ON BEHALF OF HER CHILDREN WHO ARE IN STATE CUSTODY PURSUANT TO FULLY EXHAUSTED STATE PROCEEDINGS WHICH RESULTED IN AN ORDER PERMANENTLY TERMINATING PARENTAL RIGHTS.

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MARJORIE LEHMAN, on behalf of her children, WILLIAM LEHMAN, MARK LEHMAN and FRANK LEHMAN,

Petitioners,

v.

LYCOMING COUNTY CHILDREN'S SERVICES AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Marjorie Lehman respectfully prays that a writ of certiorari issue to review

the order of the en banc United States Court of Appeals for the Third Circuit, entered on March 31, 1981, which affirmed, with four judges dissenting, an order of the United States District Court for the Middle District of Pennsylvania, entered on September 4, 1979 dismissing petitioners' petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the en banc United States Court of Appeals for the Third Circuit is not yet officially reported. The opinion of the original Panel of the Third Circuit is not officially reported. The opinion of the United States District Court for the Middle District of Pennsylvania is not officially reported. These opinions are attached in the Appendix.

JURISDICTION

The final order of the Third Circuit Court

of Appeals was entered on March 31, 1981. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1254(1).

STATUTES INVOLVED

28 U.S.C. § 2241 provides, in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * *
>
> (c) the writ of habeas corpus shall not extend to a prisoner unless--
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States
>
> * * *

28 U.S.C. § 2254 provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> * * *

1 Pennsylvania Statute, § 311(2) (Purdon Supp. 1979) provides in relevant part:

> The rights of a parent in regard to a child may be terminated after a petition filed pursuant to Section 312 and a hearing held pursuant to Section 313, on the ground that: ...
>
> (2) the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and cause of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.

STATEMENT OF THE CASE

In state court proceedings petitioner Marjorie Lehman's (alternatively referred to as "the mother") parental rights were permanently terminated in and to her children on whose behalf this proceeding was brought. The order terminating rights was made by the Pennsylvania Court of Common Pleas of Lycoming County on July 23, 1976. As a result of that Order the children were placed in the custody of the Lycoming

County Children's Services Agency eligible for adoption.

The termination order was pursuant to hearings held on May 4th and 7th, 1976. At the hearing it was shown that in June, 1971, petitioner, then a 39-year-old woman, was living with her children, (petitioners in this proceeding) then ages 7, 5, and 1, and was about to give birth to her last child. She was supported by social security, public assistance grants and food stamps. Because she had nobody to care for her children during her confinement and because her living quarters were roach-infested, she sought the aid of respondent Lycoming County Children's Service (hereafter "the agency") for temporary foster care of the boys.

Until that time, the children had been under petitioner's exclusive and continuous care and supervision. No report or adjudication of

parental neglect had ever been made or entered against her and there is no suggestion in the record that her sons had ever been improperly cared for or mistreated while they were in her custody.

After petitioner gave birth to her daughter, Tracie, the agency offered her a small apartment suitable only for her and her new baby. After some hesitation she accepted, fully expecting larger quarters imminently so that she could be reuinited with her sons. A schedule of one-hour monthly visits with them in the agency's office was arranged, which the mother never missed.

Initially the agency's plan with respect to the children was to seek their return to the mother by helping her to obtain adequate housing and providing nutrition aids to counsel her. In fact however, the agency made no effort to reunite the family. After the mother obtained legal assistance to seek return of the children

and increased visitation, the agency filed the petition to terminate parental rights to the children in this proceeding, but not to her daughter Tracie.

At the conclusion of the hearing, the court made, inter alia, the following findings and conclusions:

1. Petitioner is able to handle the custody of Tracie.

2. The three children in this proceeding are "healthy, active, alert youngsters." Although the mother loves her sons and wants them back and at least the two oldest return her affection, she "would not be able to provide intellectual or social stimulation for them, nor would she be able to channel and discipline their behavior."

3. By reason of petitioner's "very limited social and intellectual development combined with her five-year separation from the children,

the mother is incapable of providing minimal care, control and supervision for the three children [and] her incapacity cannot and will not be remedied."

4. "[T]he best interests of the children" would dictate that they remain in agency custody indefinitely."

The court made no finding that petitioner had ever neglected or abused any of her children. Nevertheless, the court permanently terminated parental rights based upon 1 P.S. § 311(2) which allows termination to be ordered on the grounds that:

> the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary

> for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.

The mother's constitutional challenge to this law was specifically rejected by the trial court. After final order of the Court of Common Pleas, an appeal was brought to the Pennsylvania Supreme Court. There it was argued that the termination of parental rights violated the Fourteenth Amendment because the state had no compelling interest in severing the parental relationship in the absence of an adjudication that she had ever failed to provide adequate child care in the past or that the boys would be exposed to serious and substantial harm by her in the future. It was further argued that the Pennsylvania standard of parental "incapacity [which] has caused the child to be without essential care, control or mental well-being" [1 P.S. § 311(2)] is impermissibly vague both on

its face and as applied to her.

With two justices disssenting, the Pennsylvania Supreme Court affirmed the termination order based on "parental incapacity, which does not involve parental misconduct." In re William L., 477 Pa. 322, 383 A.2d 1228 (1978). The majority held that the Legislature's power to protect the physical and emotional needs of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of any parental misconduct. 383 A.2d at 1234-37. It held also that the statute is not unconstitutionally vague either on its face or as here applied.

Justice Nix, dissenting, thought the termination order was unconstitutional for three reasons. First, the standard of harm to the children is too low to warrant the drastic step of involuntary termination under the Due Process Clause. Second, the standard of "parental

incapacity" as applied and on its face is void for vagueness. Third, termination based upon a parent's involuntary condition or incapacity violates the Fourteenth Amendment. 383 A.2d at 1247-1252. Justice Manderino, also dissenting, ruled that a faultless parent, involuntarily incapacitated, cannot constitutionally be subject to permanent termination of parental rights. 383 A.2d at 1252.

Timely review was sought in this Court by Petition for a Writ of Certiorari. This Court denied the petition with three justices dissenting (Justice Brennan, White and Marshall). Lehman v. Lycoming County Children's Services Agency, 439 U.S. 880 (1978).

Thereafter, petitioners filed the instant proceeding on January 16, 1979, pursuant to 28 U.S.C. §§ 2241(c)(3) and 2254 seeking a) a declaration that P.S. § 311(2) is unconstitutional; b) a declaration that the mother is the

legal parent of the children and c) an order releasing the children to her custody or in the alternative an order of release unless within sixty days of the court order a hearing were held in the appropriate state Court and it is judicially determined to be in the best interest of the children that temporary custody should remain with the agency. Petitioner contends that her children are in state custody pursuant to a state court judgment in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Specifically, she contends:

1) The absence of a showing of serious harm to the children deprived the state of a compelling interest sufficient to destroy the family relationship.

2) The standard of P.S. § 311(2) of "incapacity ... [which] has caused the child to be without essential care, control or supervision

essential to his mental or physical well-being" is void for vagueness on its face and as applied.

3) Less drastic alternatives consistent with the state's interest in child protection were available but not utilized by the state.

The district court dismissed the petition, without a hearing, in an opinion dated September 4, 1979. (pp. 135a - 149a infra.) Primarily relying on Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978) the court concluded "the custody maintained by the Respondent over the three Lehman Children is not that type of custody to which the federal habeas corpus remedy may be addressed." (p. 147a) Furthermore, the court found "it is not clear that the welfare of children or families is promoted by permitting two sets of courts to litigate such matters." (p. 148a) Timely appeal was taken to the Court of Appeals for

the Third Circuit.

On July 13, 1980 a divided panel of that Court reversed the district court. It held that "federal habeas corpus jurisdiction may be invoked to challenge the constitutionality of a state statute by which the state has taken custody of children and has terminated without consent the rights of a natural parent to them." (p. 114a) Lehman v. Lycoming County Children's Services, Agency, No. 79-2466, (3d Cir. July 23, 1980), vacated and rehearing en banc granted, (August 15, 1980). Thereafter rehearing before the court en banc was ordered.

After reargument, the en banc court affirmed the order of dismissal by the district court by a divided vote of six to four. No majority opinion was written. A plurality of four, in an opinion written by Judge Garth, who had dissented in the original panel, held that "disputes of the nature addressed here and which essentially

involve no more than the question of who shall raise a child to maturity, do not implicate the federal interest in personal liberty sufficiently to warrant the extension of federal habeas corpus." (p. 24a) A second plurality of four, in an opinion written by Judge Adams, held, inter alia, that "it does not appear that Mrs. Lehman has standing to assert [a habeas corpus] action on behalf of her three children." (p.42a)

REASONS FOR GRANTING THE WRIT

I
THE DECISION OF THE THIRD CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN DAVIS v. PAGE, 640 F.2d 599

One week before the decision was rendered by the Court below, the United States Court of Appeals for the Fifth Circuit, sitting en banc, squarely held that a parent whose child was removed from her custody by the State pursuant

to a charge of child neglect or abuse, may utilize 28 U.S.C. §§ 2241 et seq. to seek the return of the child. Davis v. Page, 640 F.2d 599, 602 (5th Cir. 1981)(en banc). The Fifth Circuit divided over the issue by a vote of thirteen to eleven. Thus, adding together the votes of the judges on the Third and Fifth Circuits in the two cases, the result is seventeen to seventeen.

Both the majority decision in Davis and the dissent, written by Judge Brown, refer to the originral panel decision in Lehman. See 640 F.2d at 602 and 606. The Attorney General of Florida has sought review in this Court of the Davis decision. Chastain v. Davis, No. 80-1888, petition for certiorari pending. That case raises both the habeas issue and the substantive question of whether counsel for parents in neglect proceedings is constitutionally mandated. The substantive question is

arguably affected by this Court's recent decision in Lassiter v. Department of Social Services of Durham County, ____ U.S. ____, 49 U.S.L.W. 4586 (June 1, 1981) and for that reason the Court may choose to remand Chastain to the Fifth Circuit for reconsideration in light of Lassiter. Whether or not this Court grants certiorari in Chastain and sets the case for oral argument, it should grant certiorari in this case and decide the jurisdictional issue after full briefing and argument.

II
THE ISSUE IN THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. The availability of Habeas Corpus to Challenge Termination Orders Should Be Decided by this Court

It is petitioner's contention that a federal court has jurisdiction pursuant to 28 U.S.C. §§ 2241 et seq to entertain an action by

a parent, on behalf of her children in state custody, who seeks reinstatement of her parental rights and return of her children on the ground that her parental rights were terminated in state court proceedings in violation of the federal Constitution.

The action falls within the literal language of section 2241(c)(3) ("in custody in violation of the Constitution ... of the United States"). Child custody disputes were cognizable at common law and, under the circumstances of this case, properly belong in federal court. There are strong policy reasons favoring utilization of habeas corpus to challenge termination of parental rights.

28 U.S.C. §§ 2254(b) requires as conditions precedent to challenging state custody that the applicant exhaust the remedies available in the courts of the state. Petitioner's claims clearly come within the literal requirements of

this statutory scheme. Her children are in custody pursuant to a state court judgment, allegedly in violation of the Constitution. Petitioner has exhausted all of her state remedies. There remains nothing within the language of the scheme which petitioner has failed to meet or is unable to meet. By the very terms of the statute she is entitled to have her claim heard pursuant to federal habeas corpus review.

The court below has decided not to allow this type of proceeding to be brought essentially for policy reasons. Assuming arguendo that it is within a court's discretion to reject a grant of jurisdiction conferred upon a federal court by Congress, when the result carves out a category of cases falling within the literal reach of a statute, this Court, and not lower federal courts, should make the decision.

The issue raised in this case is very

important. Constitutional challenges to termination of parental rights orders have increased in recent years. See e.g., Doe v. Delaware, ____ U.S. ____, 49 U.S.L.W. 4250 (1981); Lassiter v. Department of Social Services of Durham County, supra; Santosky v. Kramer, No. 80-5889, cert. granted, ____ U.S. ____ (1980). Whether ultimate review is available in federal court by way of habeas or only in this Court on direct appeal is of great importance to litigants and should be settled by this Court.

B. Habeas Corpus Should be Available to Challenge Termination of Parental Rights Orders

As this Court said in Jones v. Cunningham, 371 U.S. 236, 243 (1963), the writ of habeas corpus:

> ... is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose -- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Similarly, in Harris v. Nelson, 394 U.S. 286, 290-91 (1969), the Court characterized the Great Writ as:

> ... the fundamental instrument for safeguarding individual freedom... The scope and flexibility of the writ -- its capacity to reach all manner of illegal detention -- its ability to cut through barriers of form and procedural mazes -- have always been emphasized and jealously guarded ... the very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

In Jones v. Cunningham, 371 U.S. at 238 this Court stated:

> To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to Common law usages and the history of habeas corpus both in England and in this country.

The statutory provisions for the writ of habeas corpus are to be read as broadly as the Constitution. As the Supreme Court has held:

> To ascertain [the] meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common law principles which define its use when authorized by the statute.

McNally v. Hill, 293 U.S. 131, 136 (1934).

Art. I, § 9 of the Constitution has been interpreted to give to the federal courts the power "to dispense the writ conformably with common law practice." Fay v. Noia, 372 U.S. 391, 406 (1963). Historically, and at common law,

> [for] at least 150 years habeas corpus has been available to a parent to obtain the release of a child being illegally detained. The restraint of the child does not have to be forcible. The English courts have said in such cases that no showing of "any force or restraint" is necessary.

Sokol, Federal Habeas Corpus 73 (2d Ed. 1969). Accord, Note, Habeas Corpus - Custody of Infant, 15 Cent. L.J. 281, 282 (1881). See

also, Wales v. Whitney, 114 U.S. 564, 571 (1885).

This Court has only recently reemphasized:

> that a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. Stanley v., Illinois, 405 U.S. 645, 651. Lassiter v. Department of Social Services of Durham County, 49 U.S.L.W. at 1588.

The result reached by the court below, however, may have the consequence of precluding all federal courts, other than this Court, from an opportunity to review gross error in state court proceedings which may result in permanent loss of parental rights.

In light of this Court's decision in Moore v. Sims, 442 U.S. 415 (1979) applying the principles of Younger v. Harris, 401 U.S. 37 (1971) and its progeny to child protective proceedings, it is necessary for this Court to consider carefully the circumstances, if any, in

which it wishes to preserve for lower federal court review the momentous decision by a state court to separate involuntarily and permanently a parent from his child. If Moore v. Sims precludes review before trial, Allen v. McCurry, ____ U.S. ____, 66 L. Ed.2d 308 (1980) very likely precludes review by section 1983 after trial.

Careful consideration needs to be given by this Court to fine tune the delicate balance of our federalist government. Surely it is unwise to rely exclusively upon this Court to correct grave constitutional error intruding upon a citizen's most precious liberties. Courts and commentators have long recognized that this Court already has an over-burdened docket. See R. Stern and E. Gressman, Supreme Court Practice, 38-51 (5th Ed. 1979). Chief Justice Burger and other Justices have called particular attention to the fact that the Court has insufficient time

to give its attention to cases worthy of review. As Justice Stevens recently said, it would be incorrect to "infer that we have more than enough time to dispatch our more important business." Great Western Sugar Co. v. Nelson, 442 U.S. 92, 94 (1979)(Stevens, J., dissenting).

Indeed, this very case graphically makes this point. In this case petitioner timely presented her case for review before the Supreme Court only to have the Court deny certiorari with three justices dissenting. 439 U.S. 880 (1978). The denial of certiorari, which never reflects an endorsement of the lower court's judgment, see Brown v. Allen, 344 U.S. 443, 489-97 (1953), often can be attributed to the extraordinary demands placed upon the Supreme Court to hear cases.

Justice White, with whom Justice Blackmun joined, emphatically made this point in dissenting from a denial of certiorari in Brown

Transport Corp. v. Atcon, 439 U.S. 1014, 1016 (1978). After recording his dissent and the reasons therefor in the case, Justice White added: "Although I dissent from denial of certiorari, it must be acknowledged that this case is no more deserving of plenary consideration than many other cases in which certiorari has been denied this Term."

Justice White then randomly selected a few examples of cases deserving of plenary consideration but which nonetheless were denied review. One of the cases he cited was Beatty v. Lycoming County Children's Services, 439 U.S. 880 (1978), the companion case in the Pennsylvania Supreme Court to the instant case, sub. nom., In re Judith Denise B., 477 Pa. 322, 383 A.2d 1228 (1978). 439 U.S. at 1021. According to Justice White, cases are not reviewed which should be for the simple reason that the Court is "performing at [its] full capacity, i.e., [it is] now extending plenary

review to as many cases as [it] can adequately consider, decide and explain by full opinion." 439 U.S. at 1023.

It is important for this Court to consider in a plenary manner the dilemma created by the lower court's decision. Petitioners do not make the now discredited claim that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." Allen v. McCurry, ___ U.S. at ____, 66 L. Ed. 2d at 319.

There may be, however, important policy reasons to allow lower federal courts to consider claims of the type raised in this case. One important reason to recognize habeas jurisdiction in a case such as this is to give to the lower federal courts the power to exercise the protection of federal constitutional rights. Without this jurisdiction, the lower federal courts are prohibited from engaging in a dialectic

between state and federal courts. See generally, Cover and Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977). This Court has recognized that "[t]he educative and deterrent effect of federal review is likely to be great, since the state officials who operate the system, judges ... may be expected to take note of a federal court's determination that their procedures are unconstitutional and must be changed." Rose v. Mitchell, 443 U.S. 545, 563 (1979).

This notion of dialectical federalism is especially important in the fertile area of termination of parental rights. Consider, for example, the critical role played by two federal courts in recent years in writing seminal opinions developing the parameters of constitutional law in termination of parental rights proceedings. These cases, Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd

545 F.2d 1137 (8th Cir. 1976) and Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) have contributed substantially to the dialogue between our state and federal courts in this developing area. See generally, Cover and Alienikoff, Dialectical Federalism, supra. State courts consistently cite these cases in deciding constitutional challenges to similar laws. See e.g., Davis v. Smith, 583 S.W.2d 37 (Ark. 1979).

If lower federal courts are to be barred from deciding cases involving issues such as those raised in this case, this result should be reached after full briefing and consideration by this Court. Certainly it was not plain to petitioner, and very likely it was not plain to the Justices of this Court, that unless the Court granted petitioner's petition for certiorari to the Supreme Judicial Court of Pennsylvania, no federal review of any kind would be available to her.

This Court has decided to bar the use of habeas corpus to "redetermine constitutional claims bearing no relation to the prisoner's innocence." Stone v. Powell, 428 U.S. 465, 491 n. 31 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 258 (1973)(Powell, J., concurring). The Court concluded that there is a social disutility in applying the exclusionary rule to guilty persons in collateral proceedings. This result was reached after careful consideration. By the time Stone was decided, federal courts had already played an important role in developing the dialogue for Fourth Amendment analysis. By sharp contrast, barring issues raised in this case from habeas jurisidiction precludes federal courts from participating in a dialogue which is still only being developed.

Moreover, the claims in this case are directly akin to a claim of innocence. Petitioner asserts that she did not engage in

conduct which is sufficient to interfere with her federal right to the care and custody of her children. The precise purpose of habeas corpus is to give to the federal courts the ultimate authority to interrupt state interference with liberty in violation of federal rights. Even if the federal court found, as it might well, that the state proceeding was sufficiently fair in terms of procedures to rely on the factual record established there, see Townsend v. Sain, 372 U.S. 292 (1963) the court would nonetheless have the duty to make its own conclusions of law based upon established findings of facts. It is the contention of petitioner that the established findings of fact do not give to the state a compelling interest in permanently severing the parent-child relationship. Nothing could be closer to a claim of innocence in a criminal proceeding. See Jackson v. Virginia, 443 U.S. 307, 323 (1979).

If habeas is found now not to lie, the Commonwealth of Pennsylvania will have permanently destroyed a family realtionship -- affecting rights "far more precious than property rights," May v. Anderson, 345 U.S. 538, 542 (1953) -- without any federal court review of the merits even where there exists a substantial claim that the state action was unconstitutional. The rights involved in this case, considered "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), compel plenary access to a federal forum.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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